Ketua Polis Daerah Johor Bahru, Johor & Ors v Ngui Tek Choi

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01–240 OF 2009

B

RAMLY ALI, ANANTHAM KASINATHER AND LIM YEE LAN JJCA

20 MARCH 2013

C

Criminal Procedure — Police investigations — Remand — Whether remand order by magistrate invalid because of mistake in arrest report number — Whether magistrate before making order satisfied with identity of suspect and purpose for which remand order sought — Whether High Court wrong to have held remand order vitiated because of typographical error — Whether wrong for High Court to have questioned validity of remand order when suspect himself had not challenged legality of remand order through appropriate procedure — Whether police officers acting in obedience of remand order liable for lawful detention of suspect — Police Act 1967 s 32(1)

D

E

The respondent was detained under a six-day remand order ('the remand order') issued by a magistrate under s 117 of the Criminal Procedure Code ('CPC') to facilitate police investigations into his suspected involvement in several car theft cases. On his release from remand, after the police found there was insufficient evidence to proceed against him, the respondent sued the appellants in the High Court for damages for wrongful arrest, false imprisonment, wrongful detention and malicious prosecution as well as for injuries he allegedly sustained while in police custody. The defendants denied the claims and contended that his detention was lawful under the remand order. The High Court allowed the respondent's claim holding that his detention was unlawful by virtue of the fact the remand order was vitiated by a mistake in the investigation diaries presented to the magistrate when the remand order was applied for. The diaries which were presented to the magistrate bore the arrest report No 1340/2001 — which related to another case — instead of 1740/2001 which was the report number concerning the respondent's case. The appellants appealed to the Court of Appeal against the High Court's decision.

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Held, allowing the appeal with costs of RM5,000 and setting aside the decision of the High Court:

I

(1) The trial judge misdirected himself on the law when he ruled that the remand order was rendered null and void by the mistake in the investigation diaries relating to the plaintiff. Although the diaries presented before the magistrate bore a wrong report number a perusal of the investigation papers and the remand order showed there was no

mistake in the identity of the suspect (being the respondent) and the purpose for which the remand order was sought ie to facilitate investigations into the respondent's suspected involvement in car theft cases in the Ulu Tiram and Plentong areas (see paras 15 & 17).

(2) The fact that the magistrate issued the remand order necessarily implied that he was satisfied with the identity of the suspect and the purpose for which the remand was requested. Since the issue of a remand order was a matter of discretion of the magistrate, it was not for the trial judge to substitute his own view for that of the magistrate. Furthermore, the trial judge had himself found that the mistake in the report number was only a typographical error and that there was no malice on the part of the police in applying for the remand order (see para 18).

(3) Despite the typographical error, if there were other sufficient materials in the 'Kertas Butir-Butir Siasatan' to enable the magistrate to exercise his discretion whether or not to grant the remand order, there would be no impediment if the magistrate granted the order (see para 23).

(4) The respondent's detention during the period of his remand order was a judicial act of the magistrate under s 117 of the CPC for which the defendants could not be held liable. As provided in s 32(1) of the Police Act 1967, any police officer who acted in obedience to such a remand order was immune from liability for the lawful detention of the suspect (see paras 24 & 33).

(5) The respondent had neither pleaded the unlawfulness of the remand order in his statement of claim nor challenged the remand order by way of an appeal or revision under the relevant provisions of the CPC. The remand order against the respondent thus remained a lawful order unless and until it was set aside by a High Court exercising its criminal appellate or revisionary power. Until such time that happened, it was not the function of the High Court, as in this case, in determining a civil claim for unlawful detention, to have gone behind the remand order and questioned its legality or the manner in which it was obtained (see paras 46–48).

[Bahasa Malaysia summary

Responden direman di bawah perintah reman enam hari ('perintah reman tersebut') yang dikeluarkan oleh majistret di bawah s 117 Kanun Tatacara Jenayah ('KTJ') untuk membantu siasatan polis kerana disyaki terlibat dalam beberapa kes pencurian kereta. Selepas dibebaskan daripada reman, selepas pihak polis mendapati tiada keterangan yang mencukupi untuk meneruskan terhadapnya, responden menyaman perayu-perayu di Mahkamah Tinggi bagi ganti rugi dan tangkapan salah, pemenjaraan salah, penahanan salah dan pendakwaan berniat jahat dan juga bagi kecederaan-kecederaan yang didakwa dialaminya semasa dalam tahanan polis. Defendan-defendan menafikan

tuntutan tersebut dan menyatakan bahawa penahanannya adalah mengikut undang-undang di bawah perintah reman tersebut. Mahkamah Tinggi membenarkan tuntutan responden dengan memutuskan bahawa penahanannya adalah salah di sisi undang-undang atas fakta bahawa perintah reman tersebut dibatalkan secara silap dalam diari siasatan yang dikemukakan kepada majistret semasa perintah reman tersebut dipohon. Diari tersebut yang dikemukakan kepada majistret mempunyai nombor laporan penangkapan 1340/2001 — yang berkait dengan satu lagi kes — dan bukan 1740/2001 yang adalah nombor laporan berkaitan dengan kes responden. Perayu-perayu merayu ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM5,000 dan mengetepikan keputusan Mahkamah Tinggi:

(1) Hakim bicara tersalah arah dirinya dari segi undang-undang apabila beliau memutuskan bahawa perintah reman tersebut adalah tidak sah dan batal disebabkan oleh kesilapan dalam diari siasatan berkaitan dengan plaintif. Walaupun diari tersebut yang dikemukakan kepada majistret mempunyai nombor laporan yang salah, penelitian kertas-kertas siasatan dan perintah reman tersebut menunjukkan tidak ada kesilapan tentang identiti orang yang disyaki (responden) dan tujuan mengapa perintah reman tersebut dipohon iaitu untuk membantu siasatan ke atas penglibatan responden dalam kes-kes pencurian kereta yang disyaki di kawasan Ulu Tiram dan Plentong (lihat perenggan 15 & 17).

(2) Fakta bahawa majistret mengeluarkan perintah reman tersebut menunjukkan bahawa beliau telah berpuas hati dengan identiti orang yang disyaki dan tujuan mengapa perintah reman tersebut dipohon. Oleh sebab isu sesuatu perintah reman adalah perkara budi bicara majistret, ia bukan tanggungjawab hakim bicara untuk menggantikan pendapatnya sendiri dengan pendapat majistret. Malahan, hakim bicara sendiri telah dengan sendirinya mendapati bahawa kesilapan dalam nombor laporan hanya kesilapan menaip dan bahawa tidak ada niat jahat pada pihak polis dalam mengaplikasikan perintah reman tersebut (lihat perenggan 18).

(3) Walaupun terdapat kesilapan menaip, jika terdapat material lain yang mencukupi dalam kertas butir-butir siasatan untuk membolehkan majistret melaksanakan budi bicara beliau sama ada atau tidak hendak memberikan perintah reman tersebut, tidak ada halangan jika majistret memberikan perintah tersebut (lihat perenggan 23).

(4) Penahanan responden semasa tempoh perintah reman tersebut adalah tindakan kehakiman majistret di bawah s 117 KTJ yang mana defendan-defendan tidak boleh dipersalahkan. Seperti yang diperuntukkan dalam s 32(1) Akta Polis 1967, mana-mana pegawai polis

yang bertindak dalam pematuhan perintah reman tersebut adalah imun daripada liabiliti bagi penahanan salah orang yang disyaki (lihat perenggan 24 & 33).

(5) Responden tidak memplidkan ketidakadilan perintah reman tersebut di dalam penyataan tuntutannya dan juga tidak mencabar perintah reman tersebut melalui rayuan atau semakan di bawah peruntukan relevan KTJ. Perintah reman terhadap responden oleh itu kekal sebagai perintah yang sah kecuali dan sehingga ia diketepikan oleh Mahkamah Tinggi dalam pelaksanaan kuasa rayuan jenayah atau semakannya. Sehingga perkara tersebut berlaku, ia bukan fungsi Mahkamah Tinggi, seperti dalam kes ini, memutuskan tuntutan sivil untuk penahanan salah, membelakangkan perintah reman tersebut dan mempersoalkan kesahihannya atau cara ia diperolehi (lihat perenggan 46–48).]

Notes

For cases on remand, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3055–3057.

Cases referred to

Bala Krishnan Appala Naidu v Ketua Inspektor Prabakaran Shanmugam & Ors (No 2) [2011] 2 CLJ 890, HC (refd)
Chong Fook Kam & Anor v Shaaban & Ors [1968] 2 MLJ 50, FC (folld)
Madjai bin Sanusi v Pengarah Imigresen, Johor & Ors [2000] 5 MLJ 116; [1999] 7 CLJ 569, HC (folld)
Saul Hamid bin Pakir Mohamad v Inspector Abdul Fatah bin Abdul Rahman & Anor [1999] 6 MLJ 800, HC (refd)
Saul Hamid bin Pakir Mohamad v Inspektor Abdul Fatah bin Abdul Rahman & Anor [2007] 6 MLJ 47; [2007] 5 CLJ 93, CA (folld)
Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219; [1969] 1 LNS 170, PC (refd)
Sudha Shivarame Gowda v State of Karnataka 1993 CriLJ 1533, HC (folld)
Detention of R Sivarasa & Ors, Re The [1996] 3 MLJ 611; [1997] 1 CLJ 471, HC (refd)

Legislation referred to

Code of Criminal Prosedure [IND] s 167
Courts of Judicature Act 1964
Criminal Procedure Code ss 28, 117, 167, 307, 324
Government Proceedings Act 1956
Karnataka Criminal Rules of Practice 1968 [IND] Chapter V, r 3
Penal Code ss 304A, 323, 392
Police Act 1967 s 32(1)

Appeal from: Civil Appeal No (MT1)22–164 of 2011 (High Court, Johor Bahru)

Azizan bin Md Arshad (Norhafiza bt Kamardin with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
Vijay Chander (Zul Vijay Chander & Associates) for the respondent.

Lim Yee Lan JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is against the decision of the High Court at Johor Bahru dated 23 June 2009 which allowed the respondent's claim for damages for unlawful detention for the period between 5pm on 8–14 February 2001 and for injuries sustained during the said period to be assessed.

[2] The appellants were the defendants whilst the respondent was the plaintiff at the court below. For the purpose of this judgment parties will be referred to as they were in the court below.

FACTS

[3] The factual matrix of the case has been set out in the judgment of the learned judicial commissioner ('JC') at pp 11–12 of the appeal record *Jil* 1 *Bahagian* A. Suffice if we set out briefly the facts which were relevant to this appeal in its original language as follows:

> Pada 7.2.2001 jam lebih kurang 10:30 malam, Plaintif telah ditangkap oleh sepasukan polis yang diketuai oleh C/Insp Balakrishnan a/l Manikam berdasarkan kepada satu maklumat yang mengatakan bahawa Plaintif adalah terlibat didalam kecurian sebuah motokar. Selepas penahanan Plaintif, beliau telah dibawa ke Balai Polis Plentong. Sebuah motokar jenis Honda berpendaftaran Singapura telah ditahan bersama-sama Plaintif. Sebaik dibebaskan dari tangkapan tersebut pada 8.2.2001 Plaintif telah ditangkap sekali lagi oleh Sjn Mohd Azali Bin Awi kerana disyaki terlibat dalam kecurian motokar di kawasan Ulu Tiram dan Plentong. Kemudian Plaintif telah dibawa ke hadapan Majistret pada 9.2.2001 untuk mendapat perintah tahanan reman. Perintah tahanan reman dikeluarkan oleh Majistret dan tahanan reman telah diperintahkan ke atas Plaintif dari tarikh 9.2.2001 hingga 14.2.2001.

[4] The plaintiff was released on 14 February 2001 after the police found there was insufficient evidence to proceed against him. Upon his release, the plaintiff filed an action for damages for wrongful arrest, false imprisonment, wrongful detention and malicious prosecution and for injuries sustained while in police custody between the period from 7–14 February 2001.

[5] The plaintiff's claim was premised on abuse of power and negligence of the police offers involved in his wrongful arrest and subsequent wrongful detention. The Government of Malaysia was sued vicariously in its position as the employer of the other defendants.

[6] The defendants denied the plaintiff's claim and averred, inter alia, in their defence that his arrest and detention was for the purpose of investigating his suspected involvement in car theft cases in the Ulu Tiram and Plentong areas pursuant to two police reports, ie the Ulu Tiram Report No 656/2001 and Rpt 1740/2001 made upon the plaintiff's arrest.

[7] The defendants also averred that the plaintiff's subsequent detention in the Plentong Police Lock-Up during the period between 7–14 February 2001 was lawful as it was made pursuant to a remand order dated 9 February 2001 issued by the Johor Bahru Magistrate pursuant to s 117 of the Criminal Procedure Code ('CPC') ('the said remand order'). The defendants further denied that the plaintiff was assaulted by the police during his detention and the plaintiff was put to strict proof of his claim.

[8] During the trial both the plaintiff and the defendants called four witnesses each. At the conclusion of the trial, the learned JC found the plaintiff's detention between the period from 5pm on 8–14 February 2001 to be unlawful. In the premises, he allowed the plaintiff's claim and ordered damages to be assessed by the deputy registrar. He also awarded special damages in the sum of RM900 and costs to the plaintiff.

[9] The learned JC's finding that the plaintiff's detention during the said period was unlawful was premised on the fact that the said remand order (marked as D5 on p 6 of the appeal record *Jil* II *Bahagian* B & C) was null and void ('adalah terbatal dan tidak sah') by virtue of a mistake in the investigation diaries submitted before the magistrate during the remand application. The learned JC opined that had the attention of the magistrate been drawn to the mistake, he might not have granted the said remand order.

[10] The mistake referred to by the learned JC in the investigation diaries as having the effect of vitiating the said remand order (marked as D6 on p 6 of the appeal record *Jil* II *Bahagian* B & C), relates to the plaintiff's arrest report where the correct number is 1740/2001 and not 1340/2001 (being a report relating to an immigration offence by an Indonesian national) as stated therein.

[11] It was submitted before us by learned senior federal counsel ('SFC') Encik Azizan bin Md Arshad, on behalf of the defendants, that the learned JC's aforesaid finding ran counter to established principles laid down in various decided cases in this country regarding the effect of a remand order issued by a

magistrate pursuant to s 117 of the Criminal Procedure Code ('CPC') as well as any subsequent detention made pursuant thereto (see *Chong Fook Kam & Anor v Shaaban & Ors* [1968] 2 MLJ 50, *Madjai bin Sanusi v Pengarah Imigresen, Johor & Ors* [2000] 5 MLJ 116; [1999] 7 CLJ 569, *Saul Hamid bin Pakir Mohamad v Inspector Abdul Fatah bin Abdul Rahman & Anor* [1999] 6 MLJ 800 and *Saul Hamid bin Pakir Mohamad v Inspektor Abdul Fatah bin Abdul Rahman & Anor* [2007] 6 MLJ 47; [2007] 5 CLJ 93).

[12] It was submitted, inter alia, that these authorities established that in any particular case, whether a remand order ought to be issued is a matter entirely within the discretion of the magistrate and a remand order, once issued, constitutes the act of a judicial authority under s 117 of the Criminal Procedure Code ('CPC') and any police officer acting in obedience to such order is immune from liability for such lawful detention, as clearly provided in s 32(1) of the Police Act 1967.

[13] Learned counsel for the respondent, Encik Vijay Chander, on the other hand, submits, inter alia, that the cases of *Chong Fook Kam*, *Madjai Sanusi* and *Saul Hamid* did not apply to the present case as there was no evidence in those cases that the remand order was issued pursuant to an incorrect or irregular investigation diaries as was found by the learned JC in this case. It was submitted that s 32(1) of the Police Act 1967 only protects the defendants from any liability for any detention made pursuant to a regular and valid remand order and not otherwise.

OUR DECISION

[14] The appeal came up for hearing before us on 8 May 2012 and upon hearing submission from learned counsel for both parties and perusing the appeal records and judgment of the learned JC, we had allowed the defendants' appeal. We now set out the grounds of our decision.

[15] Having carefully considered the facts before us and the aforesaid authorities cited by learned SFC, we were in agreement with him that the learned JC had misdirected himself on the law when he ruled that the said remand order was rendered null and void by the mistake on the investigation diaries relating to the plaintiff. We say so for the following reasons.

[16] It was an undisputed fact that the detention of the plaintiff between the period from 8–14 February 2001 was made pursuant to the said remand order under s 117 of the Criminal Procedure Code ('CPC'), which reads as follows:

> 117 (1) Whenever any person is arrested and detained in custody and it appears that the investigations cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall forthwith transmit to the Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.
>
> (2) The Magistrate before whom an accused is produced under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole …
>
> (3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for doing so.

[17] It was also not in dispute that the investigation diaries presented before the learned magistrate during the remand application bore a wrong police report number ie 1341/01 instead of 1740/2001, which was the correct number. Nevertheless, a perusal of the said 'Kertas Penyiasatan' (P6) and the said remand order (P5) showed that there was no mistake in the identity of the suspect as 'Ngui Tek Cho' and the purpose of the remand for the requested period was to facilitate investigation into care theft cases in the Ulu Tiram and Plentong areas in which the plaintiff was suspected to be involved in.

[18] In our view, the fact that the magistrate issued the said remand order would necessarily imply that the learned magistrate was satisfied with the identity of the suspect as well as the purpose of the remand requested. The learned JC had himself found that the mistake in the police report number in the investigation diaries was only a typographical error and there was no malice on the part of the police in applying for the said remand order. As stated earlier, since the issue of a remand order is a matter of discretion of the magistrate, surely it was not for the learned JC to substitute his own view for that of the magistrate.

[19] Even assuming for a moment that the typographical error on the investigation diaries submitted before the magistrate for the plaintiff's remand rendered the said investigation diaries defective, the next question that arose is whether such defect can affect the jurisdiction of the magistrate or vitiate the order issued by him subsequently?

[20] In this regard we found it instructive to refer to the Indian case of *Sudha Shivarame Gowda v State of Karnataka* 1993 CriLJ 1533 (Kant) which in our view might lend some assistance in answering this question.

[21] In that case, the error committed by the police during the remand application involved the non-production of the entries in the case diaries as

required under s 167 of the CPC (in pari materia with s 117 of our CPC) and r 3 of Chapter V of the Karnataka Criminal Rules of Practice 1968. One of the issues raised was whether such an error can affect the jurisdiction of the magistrate or vitiate the remand order made by him subsequently.

[22] The High Court therein held, inter alia, that despite the non-production of the entries in the case diaries, if the materials already before the magistrate are adequate for the magistrate to make an order of remand under s 167 of the CPC there is no legal impediment to pass an order under s 167 (see commentary by Ratanlal & Dhirajlal in the book *The Code of Criminal Procedure Code* (Act II of 1974), (20th Ed), 2011 (published by LexisNexis Butterworths Wadhwa) at p 367.

[23] Applying the principle laid down in *Sudha Shivarame Gowda* to this appeal, we were of the view that despite the typographical error, if there were other sufficient materials in the 'Kertas Butir-Butir Siasatan' to enable the learned magistrate to exercise his discretion whether or not to grant the remand order, there would be no impediment for the magistrate to do so.

[24] In any case, as rightly pointed out by learned SFC, it is trite law, as laid down in *Chong Fook Kam*, *Madjai Sanusi* and *Saul Hamid*, a remand order once issued constitutes the act of a judicial authority under s 117 of the Criminal Procedure Code ('CPC') and any police officer acting in obedience to such an order is immune from liability for such lawful detention, as clearly provided in s 32(1) of the Police Act 1967, which reads as follows:

> 32 (1) Where the defence to any suit instituted against a police officer … is that the act complained of was done in obedience to a warrant purporting to be issued by any competent authority, the court shall, upon production of the warrant containing the signature of such authority and upon proof that the act complained of was done in obedience to such warrant enter judgment in favour of such police officer …

[25] In *Choong Fook Kam* the facts were that the two plaintiffs were arrested on 11 July 1965 for an offence, said to have been committed on the previous day against either s 304A of the Penal Code or s 34A of the then Road Traffic Ordinance 1958. The plaintiffs were held in custody overnight and brought before the magistrate on 12 July when he made an order for their detention for seven days under s 117 of the Criminal Procedure Code ('CPC') for further investigation. On the next day the plaintiffs were released, the police having found that there was not sufficient evidence to proceed against either of them. The plaintiffs' filed an action for false imprisonment against the three defendants who are two police officers and the Government of Malaysia. The

plaintiffs' action was dismissed in the High Court of Malaya but was successful on appeal in the Federal Court of Malaysia, where judgment was given in their favour for damages of $2,500 each.

[26] Suffian FCJ, writing on behalf of the Federal Court, held, inter alia, that an order of a magistrate authorising the detention of the arrested person beyond the period of 24 hours made under s 117 is a judicial act and cannot found a claim for damages against the magistrate because of s 107(1) of the then Courts Ordinance 1948, nor may such an order found a claim for damages against a police officer because of s 41(1) of the then Police Ordinance No 14 of 1952 (now s 32(1) of the Police Act).

[27] On appeal by the defendants against the Federal Court's decision to the PC, (see *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219; [1969] 1 LNS 170), Lord Devlin (delivering the judgment of the board) observed that it was agreed by all the parties thereto that 'the false imprisonment, if any, was brought to an end by the magistrate's order.'

[28] In the case of *Saul Hamid*, the plaintiff was arrested on 21 March 1987 by the first defendant and was subsequently detained and placed under remand pending investigations for a total period of nine days.

[29] Upon his release, the plaintiff sought by way of a civil suit damages for wrongful arrest, wrongful detention and malicious prosecution, on the ground of abuse of power, negligence and/or breach of statutory duty on the part of the defendants. The plaintiff claimed his arrest and the period of detention immediately upon arrest, as well as the period he was placed under remand pending investigations, to be unlawful.

[30] One of the issues raised was whether, on the facts of the case, the detention of the plaintiff was authorised by law. On this issue the trial judge held as follows:

> 3. Whether the detention of the plaintiff lawful?
>
> The arrest for the purpose of using the period of detention to dispel or confirm the reasonable suspicion by questioning the suspect or seeking further evidence with his assistance is well established as one of the primary purpose upon detention.
>
> Article 5(4) of the Federal Constitution provides that 'Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority'.
>
> Section 28 of the Criminal Procedure Code makes the same provision. It reads:

> 28 (i) A police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release take or send the person arrested before a Magistrate's Court.
>
> (ii) No police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable.
>
> (iii) Such period shall not in the absence of or after the expiry of a special order of a Magistrate under section 117 exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

What happens when the police cannot complete his investigations within the 24 hours fixed by s 28 and wishes to further detain the arrested person? He could act under s 117 which reads:

> 117 (1) …

On the facts of this case it is not in issue that the plaintiff was arrested on the 21 March 1987 which is a Saturday. The 22 March 1987, being Sunday, is an excluded day. The plaintiff was produced before the magistrate on Monday 23 March 1987 at about 10.30am where the application for a remand order under s 117 of the Code was made by the first defendant, which was granted by the magistrate for a period of two days from 23–25 March 1987.

As to the second remand order under s 117 of the Code granted by the President session court on 25 March 1987, it is in evidence that that decision was the subject of criminal revision by the Honorable Edgar Joseph Jr J where the honorable judge had ruled in the plaintiff's favour as reported in *Saul Hamid v Public Prosecutor* [1987] 2 MLJ 736.

Be that as it may I am of the considered opinion that even if this court were to accept this ruling that the plaintiff had a right to be represented by counsel in remand proceedings, it does not necessarily follow as a matter of course that an action will lie against the police officer who acted on the order of remand made by the sessions court President for the following two reasons.

In the first place, the President sessions court is immune from civil proceedings by reason of s 107(1) of the Subordinate Courts Act 1948. See *Chong Fook Kam & Anor v Shaaban and Ors* [1968] 2 MLJ 50 at p 52 where it was held:

> that an order of a magistrate authorising the detention of the arrested person beyond the period of 24 hours made under s 117 is a judicial act and cannot found a claim for damages against the magistrate.

Nor may such an order found a claim for damages against the police by reason of the immunity conferred upon them by s 32(1) of the Police Act which reads as follows:

…

Applying these statutory provisions to the facts of this case, as it is not in issue that the detention of the plaintiff from 2–29 March 1987 by the police pending investigations was clearly in obedience of two orders issued by two judicial officers which are valid on the

face of it, I therefore hold that the remand subsequent to the order of the judicial officer was the action of the magistrate/sessions court President for which the first defendant cannot be held responsible for false imprisonment. In these circumstance the claim of the plaintiff that he was unlawfully detained from 25–29 March 1987 is clearly unsustainable in law. (Emphasis added.)

[31] The appellant's subsequent appeal to the Court of Appeal against the High Court's decision in that case was dismissed on the ground, inter alia, that '… the appellant's remand for nine days was for investigation purposes for both offences under ss 392 and 323 of the PC. For that reason the first respondent could not be held responsible for wrongful arrest and false imprisonment' (see paras 41–42 of the judgment reported in [2007] 6 MLJ 47; [2007] 5 CLJ 93).

[32] Lastly we refer to the case of *Madjai Sanusi*, in which the issue raised is whether the applicant can seek release from custody under a warrant of remand imposed by the magistrate's court by way of a writ of habeas corpus. Malik Ishak J (as he then was) held, inter alia, that a person detained in custody under a warrant of remand lawfully passed by the magistrate, a court of competent jurisdiction, could not be said to be illegally or improperly detained. When the Johor Bahru Magistrate ordered the remand of the applicant it was in the nature of a criminal pronouncement which cannot be challenged by way of a writ of habeas corpus.

[33] Applying the principles laid down in the aforesaid decisions in *Chong Fook Kam*, *Madjai Sanusi* and *Saul Hamid* as regards the effect of a remand order issued under s 117 of the Criminal Procedure Code ('CPC') as well as the provisions of s 32(1) of the Police Act 1967 as enumerated above, we were of the view and agreed with learned SFC that, for all intents and purposes, the plaintiff's detention between the period from 8–14 February 2001 was a judicial act of the said magistrate for which the defendants could not be held liable for false imprisonment.

[34] In detaining the plaintiff pursuant to the said remand order for the purpose of investigation into the alleged offences for which he was arrested, the defendants, as police officers, were merely acting in obedience to the said remand order and were immune from liability pursuant to s 32(1) of the Police Act 1967.

[35] It has also been laid down in, inter alia, *Madjai Sanusi*, that a remand order issued by a magistrate on the face of which is a lawful order remains so for all intents and purposes until and unless it is set aside by a court of competent jurisdiction.

[36] This principle was adopted in the recent case of *Bala Krishnan Appala*

Naidu v Ketua Inspektor Prabakaran Shanmugam & Ors (No 2) [2011] 2 CLJ 890 (HC) in which VT Singam J, following the decision in, inter alia, *Madjai Sanusi*, discussed the matter at length in his judgment, albeit by way of obiter.

[37] In *Bala Krishnan*, the facts were that the plaintiff had been arrested by the first defendant on 3 January 2000 and was detained at the Rawang Police Station until 5 January 2000. Alleging wrongful imprisonment, the plaintiff filed an action against the first defendant, the second defendant, the officer in charge of Rawang Police Station and the Government of Malaysia vicariously claiming various relief and damages.

[38] It was the plaintiff's pleaded case that his detention was unconstitutional and unlawful, as no remand order for the detention had been obtained by the defendants. This plea however ran counter to the facts, as a remand order ('D16') had been obtained from the magistrate by the investigating officer, one Chief Inspector Mohd Ghazali ('IO').

[39] At the trial, upon being confronted with D16, the plaintiff maintained that the defendants were still liable to him, as 'the remand order was defective in law.' It was the plaintiff's stand, in regurgitating the unpleaded allegation, that he was entitled to rely on the general averments in his statement of claim.

[40] The learned judge held, upon the facts before the court, the issues that arose before him were: (a) whether the plaintiff could on the facts and in the circumstances be allowed to raise the issue of illegality or defectiveness of D16; and (b) whether, bearing in mind the Government Proceedings Act 1956 and the fact that the IO herein had not been named as a defendant, the Government of Malaysia could ever be capable of vicarious liability.

[41] The learned judge, in dismissing the claim, held, inter alia, that a remand order of a magistrate which on the face of it is a lawful order cannot be questioned or challenged unless and until it is set aside by a court of competent jurisdiction.

[42] For ease of reference, we set out the following passages of his judgment found at paras 34–38 pp 907–909 which read as follows:

> [34] This court also wishes to state that it is not the function of this court to question the regularity of the remand order and how it was obtained. On the other hand, if the plaintiff's case as contended by learned counsel for the plaintiff is that the remand order is defective or invalid in law, the plaintiff should have taken up his complaint by way of criminal revision or appeal against the decision to remand the plaintiff and followed the procedures as laid down under the CPC to take his grievance to the High Court in order to challenge the remand order. (see s 323 of the CPC and s 31 of the Courts of Judicature Act 1964). Judicial power is never

exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature.

[35] …

[36] As far as the investigating officer is concerned, his duty is to simply apply for a remand order if the circumstance so require to the magistrate as required by s 117 of the CPC. There is no duty imposed upon the investigating officer to question the validity of the remand order given by a magistrate. So long as the investigating officer had obtained the remand order from a magistrate to detain a suspect who has been arrested for a criminal offense for further investigation, he is deemed to have dutifully carried out his legal obligation as required of him to detain the suspect for further investigation and that it was carried out in accordance with the law. A police officer, in the present case, the investigating officer (DW2) who finds that he cannot complete his investigation within the period of 24 hours fixed by s 28 of the CPC and if he wishes to further detain the person arrested in the present case, the plaintiff, he could act under s 117 of the Criminal Procedure Code ('CPC') and shall produce the plaintiff before the magistrate to obtain a remand order to detain him and this is what the investigating officer had carried out and in accordance to the law. The investigating officer (DW2) had carried out his legal duty by having obtained the remand order (exh D16). As stated above, he has no right to question the validity of the remand order as his duty is merely to carry out his duty pursuant to the remand order as given by the magistrate (see *Chong Fook Kam & Anor v Shaaban & Ors* [1968] 2 MLJ 50; [1968] 1 LNS 23 at pp 52–53).

[37] *The detention of the plaintiff from 3–5 January 2000 was carried out by the investigating officer (DW2) in obedience to the remand order produced and marked as exh. DI6 and as granted by Tuan Hj Saad bin Ismail (DW1), a second class magistrate. DW1 had confirmed his signature on the remand order and that he had granted the same. Therefore there was no issue of any tortious act committed by the investigating officer (DW2) who has also not been cited as a party in the present case. There is also no case against the first defendant. Accordingly, the detention of the plaintiff from 3–5 January 2000 is not false imprisonment as alleged.*

[38] *This court finds that to all intents and purposes the remand of the plaintiff from 3–5 January 2000 was valid in law and in accordance of the law (seeMadjai Sanusi v Pengarah Imigresen Negeri Johor & Ors* [1999] 7 CLJ 569*). In fact, the remand order involves two process or requirements, first, the application by the investigating officer to the magistrate to obtain the remand order, secondly, the order to be made by a judicial officer ie, whether to grant the remand, in order to detain the suspect for further investigation or to refuse the remand. In the present case, both the requirements have been complied. Therefore, the detention of the plaintiff from 3–5 January 2000 was made pursuant to the remand order (exh D16). On the face of the remand order, this court finds it is valid …* (Emphasis added.)

[43] We were of the opinion that the foregoing passages of the judgment in *Bala Krishnan* state the correct position of the law regarding a remand order issued under s 117 of the Criminal Procedure Code (CPC). A

[44] As could also be gathered from *Madjai Sanusi* and *Bala Krishnan*, the two obvious ways of challenging a warrant of remand issued by a magistrate is either by way of an appeal under s 307 of the CPC or an application for revision pursuant to s 323 of the CPC. B

[45] We were further of the view that since the issue of a remand order under s 117 of the Criminal Procedure Code ('CPC') is an exercise of a magistrate's criminal jurisdiction, the relevant High Court which has the jurisdiction to set aside his order is a High Court exercising its criminal appellate or revision power under the CPC and the Courts of Judicature Act 1964. For example, in *Re The Detention of R Sivarasa & Ors* [1996] 3 MLJ 611; [1997] 1 CLJ 471, the High Court at Kuala Lumpur in exercise of his power of revision under s 324 of the CPC set aside an omnibus remand order issued by the magistrate's court upon an application by the detainees). C D

[46] In the present appeal before us, it was observed that the plaintiff neither pleaded the unlawfulness of the remand order in his statement of claim nor challenged the remand order by way of an appeal or revision under the relevant provisions of the CPC. E

[47] That being the case, the said remand order dated 9 February 2001 made against the plaintiff remained a lawful order unless and until it is set aside by a High Court exercising its criminal appellate or revision power. F

[48] Until such time, it is really not the function of the learned JC in this case, in determining a civil claim for unlawful detention, to go behind the remand order and to question its legality or the manner in which it was obtained. G

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I

A CONCLUSION

[49] In the circumstances and for the above reasons, we were of the unanimous view that this appeal had merits. We had accordingly set aside the decision of the learned JC and allowed the appeal with costs of RM5,000.

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Appeal allowed with costs of RM5,000 and decision of the High Court set aside.

Reported by Ashok Kumar

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